IN THE

Supreme Court of the United States

October Term, 1970

No. 1113

LEE WAY MOVING STORAGE, INC., *Petitioner*,

v.

MARCUS JONES, ET AL., *Respondents*.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

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* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

The instant case is one of major importance in the administration of Title VII of the Civil Rights Act of 1964. The questions presented are two-fold:

> *First*, whether statistical data showing a racially imbalanced work force or particular job classification is sufficient, standing alone, to establish a *prima facie* case of unlawful discrimination within the meaning of Title VII;[1] and
>
> *Second*, whether, when a *prima facie* case of unlawful discrimination has been established, the continued maintenance of racially neutral employment policies may be justified only where they are demonstrated to be "*essential* to the safe, efficient operation of the company's business" (431 F. 2d at 250) (emphasis added).

The National Chamber has heretofore addressed itself to the second of the above issues, and advanced to this Court the compelling reasons in favor of a "legitimate business purpose" rather than a "business necessity or essentialness" criterion, as an *amicus curiae* in *Griggs* v. *Duke Power Company*, No. 124, this term. Clearly, the illegitimacy of the "business essentialness" test is all the more apparent when it is joined in tandem with the far-reaching, and equally unwarranted, method of establishing *prima facie* discrimination invoked in the present case by the Tenth Circuit. To the extent, therefore, that this Court does not find it necessary in *Griggs* to resolve the permis-

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[1] Although only past or pre-Act discrimination is here involved, there is clearly no basis, if the Tenth Circuit's statistical imbalance test is proper, for applying a different standard for adjudicating allegations of current or post-Act discrimination. Cf. *Parham* v. *Southwestern Bell Telephone Company*, — F.2d —, 3 CCH Emp. Prac. Dec. ¶ 8021 (8th Cir., 1970).

sibility of such a criterion, the present case provides an appropriate vehicle for the resolution of this critical issue.

In the event, however, that *Griggs* does determine the test to be applied in gauging the merits of the defense raised to an allegation of unlawful discrimination, the additional question here presented similarly warrants resolution by this Court. If statistical evidence, in and of itself, is sufficient to establish a *prima facie* violation of Title VII, a countless variety of long-standing racially-neutral employment policies will be open to attack. Moreover, employers who have affirmatively sought to improve the racial composition of their work force may nevertheless be found to have engaged in unlawful discrimination if they have not achieved a fully integrated work force at all levels.[2] In short, if statistical imbalance is the only touchstone necessary for ascertaining a violation of Title VII, then virtually every employer in the nation, in one manner or another, may be considered a law-breaker.[3]

The interest of the National Chamber, therefore, in filing this brief *amicus curiae* urging that the petition

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[2] For example, in the present case it was stipulated that during the two-year period preceding the filing of the suit, Lee Way, in addition to "search[ing] diligently" for qualified blacks to fill over-the-road driver openings, also "advertised in newspapers and . . . participated in virtually every community or governmental sponsored program" in an effort to correct the racial imbalance in its over-the-road driver classification (Stipulation, p. 4).

[3] As Petitioner observes in his brief (pp. 14-15), it is an unfortunate but inescapable fact that racial imbalance, as well as sex and other disproportionate minority representation, continues to be widely prevalent in employment throughout the United States. The instant case, accordingly, where a fully integrated work force is still unrealized, is not a rare or isolated instance but one which remains common throughout the nation.

for writ of certiorari be granted, is based on the substantial and far-reaching consequences that the decision of the court below will have for American industry.

REASONS FOR GRANTING THE WRIT

1. The decision below will require the abandonment of numerous racially-neutral employment practices now serving legitimate and important business needs. Thus, in the trucking industry alone, where a tradition of separate bargaining units and different collective bargaining agreements for over-the-road and city drivers has prevailed for many years, the present holding outlawing the widely prevalent[4] no-transfer policy will have a significant impact.[5] A similar effect will also occur in numerous other industries. To cite a few of many possible examples:

> (a) Most employers today follow the practice of promoting employees from within their own ranks in order to encourage their continued employment and to hopefully inspire a higher level of performance. Although such a practice is neither essential to the "safe" or "efficient" operation of a business, it is nevertheless commonly recognized to be a sound and desirable employee relations policy. Yet, under the decision below,

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[4] See, e.g., *Bing* v. *Roadway Express, Inc.*, — F.Supp. —, 3 CCH Emp. Prac. Dec. ¶ 8028 (N.D. Ga., 1970) at 6077.

[5] Although the decision below would presumably allow the continued application of Lee Way's no-transfer policy to its white city and over-the-road drivers, it is doubtful that such a discriminatory application would be permitted by either the union representing those drivers or by an arbitrator in the event the matter is challenged in an arbitration proceeding.

any enterprise that has been marked by a prior or current statistical under-representation of Negroes, other minority employees or even females would be required to waive the application of such a promotional policy on the theory that the "present application" thereof locks the under-represented group out of higher-paying jobs and thereby serves to "perpetuate past racial discrimination."

(b) The application of the lower court's rationale would also jeopardize the stability of hundreds of thousands of pension and profit-sharing plans. Most of these plans have minimum yearly service requirements as a prerequisite to obtaining benefits thereunder.[6] Since these requirements could no more be justified on grounds of "business necessity or essentialness" than Lee Way's no-transfer policy, they would have to be waived or modified as to any minority group which had been historically under-represented in the employer's work force. The resultant effect on the benefits available to present members of such plans would be of staggering proportions.

(c) A countless variety of other equally *bona fide* employment practices would be subject to challenge if the decision below is allowed to stand. Particularly vulnerable are the interrelated provisions found in most present collective bargaining agreements giving senior employees preference with respect to lay-off and recall rights, as well as the privilege of bumping junior employees, in the event of a reduction in the work force. These and

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[6] See Bureau of Labor Statistics, United States Dept. of Labor, *The 100 Largest Retirement Plans*, 1960-1968 (October 1, 1969).

other manifold provisions assuring greater job security for older workers who are most severely affected during periods of economic slowdown and increased unemployment have become an ingrained part of our American tradition. They should not be disturbed absent the most compelling countervailing considerations.

2. The foregoing examples are neither hypothetical nor remote. In fact, the approach adopted by the Tenth Circuit may well force employes not only to abandon racially-neutral employment practices serving significant business ends, but also to engage in preferential treatment to members of under-represented groups in order to eliminate existing statistical imbalances and avoid potential liability. Thus, encouraged perhaps by the decision of the court below and notwithstanding the absence of any determination by this Court, the Equal Employment Opportunity Commission recently intervened in a rate proceeding before the Federal Communications Commission involving American Telephone and Telegraph Company, apparently predicated solely on statistical imbalances within that Company's work force, seeking, *inter alia*, an order from the FCC requiring that "no new Anglo male [be] hired into any position which is currently populated by a disproportionate number of Anglo males until all currently-employed women, blacks, Spanish-surnamed Americans and other minorities are given the opportunity to fill the vacant position." Petition for Intervention in *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Company*, as reported at BNA Daily Labor Report (Dec. 11, 1970), at p. F-2. Similarly, the Department of Justice also just instituted a pattern and practice suit

against the United States Steel Corporation at its Fairfield, Alabama, plant after seeking unsuccessfully to secure a voluntary commitment requiring that employer to allocate fifty percent of all office and clerical jobs to blacks. *United States* v. *United States Steel Corporation*, (N.D. Ala., 1970), as reported at BNA Daily Labor Report (Dec. 14, 1970), at p. A-5; N.Y. Times, December 15, 1970, at 1 and 30, col. 4.

3. In view of the express assurances given during the debates preceding the adoption of Title VII that its enactment would leave "management prerogatives . . . undisturbed to the greatest extent possible,"[7] the seriously disruptive impact of the decision below deserves the careful scrutiny of this Court.

The enactment of Title VII manifested a deep Congressional concern over the depressed economic condition of the Negro and other minority groups in American society.[8] Congress did not contemplate however that forced racial balance would be the means to solve the problem of discrimination in the national work force. Recognizing the futility of attempting to promote "equality with mathematical certainty" through the imposition of strict standards designed to "impose [a] forced racial balance upon employers or labor unions,"[9] Senators Clark and Case, the Senate floor managers of Title VII, made it clear that statistical data, while certainly relevant to determining whether

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[7] H.R. Report No. 914, Part 2, 88th Cong., 1st Sess., December, 1963, reported in 2 U.S. Code Cong. Ad. News 2391, 2516 (1964).

[8] See 3 U.S. Commission on Civil Rights, 1961, Report 187. See also Hearings on S. 773 before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Welfare, 88th Cong., 1st Sess. 116-19, 321-74, 433-55 (1963).

[9] H.R. Report No. 914, 88th Cong., 1st Sess. (1963), *supra* n. 7.

a particular individual has been discriminatorily denied employment or promotional opportunities, should not be given what is, in effect, the *conclusive* weight accorded here by the lower Court.[10] Indeed, to underscore this intent, Congress added Section 703(j) to the Act to assure that the absence of a racially balanced work force could never alone constitute sufficient evidence of unlawful discrimination.[11]

4. As in so many other areas of civil rights and industrial relations, Title VII requires an accommodation between all of the competing interests involved "with as little destruction of one as is consistent with the maintenance of the other."[12] Independent proof of unlawful discrimination could have been supplied in the instant case, for example, had it been shown that Negroes had applied for the over-the-road positions but had been systematically rejected. Instead, the uncontroverted evidence established no specific instances of discrimination and, indeed, that, prior to the filing of the present suit, no Negro had ever applied for an over-the-road job (431 F. 2d at 247; Interrogatories, No. 31). To find a violation of the Act in these circumstances surely does not seek to balance the important rights here at issue. The result is one which imposes an intolerably disruptive burden upon American industry and distorts the purpose and intent of Title VII.

[10] See Clark-Case Memorandum, 110 Cong. Rec. 7213 (April 8, 1964).

[11] See, e.g., § 703(j) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(j); 110 Cong. Rec. 12723 (June 4, 1964).

[12] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112. See also *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 323; *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34; *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375.

CONCLUSION

For the foregoing reasons, the Chamber urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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